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No. 87-2048

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO, INC.

Petitioner.

vs.

RICKY HASBROUCK, d/b/a
RICK'S TEXACO, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF OF NATIONAL ASSOCIATION OF WHOLE-
SALEER-DISTRIBUTORS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This case presents a question which goes to the very heart of the legislative objectives of the Robinson-Patman Act. The question that is of vital interest to the wholesale-distribution industry is:

Whether the Robinson-Patman Act is violated by a manufacturer who sells goods to wholesalers at a lower price than to retailers.

TABLE OF CONTENTS

	<u>PAGE</u>
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE	1
BRIEF	4
QUESTION PRESENTED	i
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE NINTH CIRCUIT INCORRECTLY CONCLUDES THAT A SUPPLIER WHO SELLS AT UNIFORM PRICES TO PUR- CHASERS AT THE SAME FUNCTIONAL LEVEL IN THE CHAIN OF DISTRIBUTION MAY BE LIABLE UNDER THE ROBINSON-PATMAN ACT IF THE DIS- COUNT AFFORDED IS NOT COST BASED AND PART OF IT IS PASSED ON TO CUSTOMERS OF THE PURCHASERS WHO COMPETE WITH OTHER CUS- TOMERS OF THE SUPPLIER	5
II. THE ROBINSON-PATMAN ACT IS NOT VIOLATED WHEN A MANUFACTURER SELLS TO WHOLESALERS AT A LOWER PRICE THAN RETAILERS	14
CONCLUSION	20

TABLE OF AUTHORITIES

	<u>PAGE</u>
<i>American Oil Co. v. McMullin</i> , 508 F.2d 1345 (10th Cir. 1975)	9
<i>Best Brands Beverage, Inc. v. Falstaff Brewing Corporation</i> , 842 F.2d. 578 (2nd Cir. 1987) . .	13
<i>Boise Cascade Corporation v. F.T.C.</i> 107 F.T.C. 76 (1986), rev'd and remanded 837 F.2d. 1127 (D.C. Cir. 1988)	13,15,18
<i>Center-Winston Corp. v. Edward Hines Lumber Co.</i> , 447 F.2d. 585 (7th Cir. 1971)	8
<i>Dart Industries v. Plunkett Co.</i> , 704 F.2d. 496 (10th Cir. 1983)	13
<i>Doubleday & Co.</i> , 52 F.T.C. 169 (1955)	14,17
<i>Eximco, Inc. v. Trane Co.</i> , 737 F.2d. 505 (5th Cir. 1984)	19,20
<i>FLM Collision Parts v. Ford Motor Co.</i> , 543 F.2d. 1019 (2nd Cir. 1976) Cert. Denied, 429 U.S. 1097 (1977)	7
<i>Falls City Industries v. Vanco Beverage, Inc.</i> 460 U.S. 428 (1983)	16
<i>FTC v. General Foods Corp.</i> , 52 F.T.C. 798 (1956)	15
<i>FTC v. Morton Salt Co.</i> , 334 U.S. 37 (1948) . . .	15,16
<i>FTC v. Rubenoid Co.</i> , 343 U.S. 470 (1952)	8,12,13
<i>Hartley & Parker, Inc. v. Florida Beverage Corporation</i> , 307 F.2d. 916 (5th Cir. 1962) . .	9

	PAGE
<i>Mueller Company</i> , 60 F.T.C. 120 (1962), <i>aff'd</i> 323 F. 44 (7th Cir. 1963), Cert. Denied 377 U.S. 923, (1964)	13,14,18
<i>Perkins v. Standard Oil Co.</i> , 395 U.S. 642 (1969)	16
<i>USM Corp. v. SPS Technologies, Inc.</i> , 694 F.2d. 505 (7th Cir. 1982), Cert. Denied 462 U.S. 1107 (1982)	8
<u>Miscellaneous:</u>	
Arthur Andersen & Co., <i>Facing the Forces of Change, Distribution Research and Education Foundation</i> , 1987	2
E. Kinter, <i>The Legislative History of the Federal Antitrust Laws and Related Statutes</i> , (1978)	7
FTC Advisory Opinion, File No. 683-7092, Released March 14, 1968	12
H.R. Rep. 2287, 74th Congress, 2d Session, 8-9 (1936)	7
Louis H. T. Dehmlow, <i>Superconductive Ideas</i> (1988)	10
Sylvia Nasar, <i>America Still Reigns in Services, Fortune</i> , June 5, 1989	7

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MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF

National Association of Wholesaler-Distributors, a national trade association, respectfully moves this Honorable Court for leave to file amicus curiae brief in support of Petitioners. The attorney of record for the Petitioner has consented to such filing. The attorney of record for Respondents has declined to consent to such filing.

The National Association of Wholesaler-Distributors (NAW) is a federation of approximately 116 national wholesale distribution trade associations, 54 state and regional trade associations and some 2,000 individual wholesale distribution firms, representing in the aggregate, over 40,000 wholesale distribution companies nationwide.

Wholesale distribution is an enormous and economically potent industry with 1986 sales in excess of two trillion dollars. The industry employed approximately 5.8 million persons in that year.

While the composite sales and employment statistics attest to the vital role of wholesale-distribution, the fact is that the vast majority of firms in the industry tend to be small to medium, closely-held, family owned businesses, the very type of business for which Congress enacted the Robinson-Patman Act in order to restore equality of opportunity in the marketplace.

While the movement of goods is their primary purpose, wholesale-distributors inevitably offer marketing, financial and logistical support to both suppliers and customers as a natural part of the wholesale distribution process.

The typical wholesaler-distributor establishes a market connection among hundreds of manufacturers and customers. Many of these manufacturers must rely on wholesaler-distributors as their sole access to the market, as the entity through which they create and nurture a relationship with their customers. In this way, the wholesaler-distributor is a critical factor in the U.S. economy. (*Facing the Forces of Change*, Arthur Andersen & Co., published by Distribution Research and Education Foundation, 1987)

The decision in this case is one which transcends in importance the interest of the immediate litigants. As the principal voice of wholesale distribution the amicus is well suited to present to the court the effect on the wholesale distribution industry of the decision of the Ninth Circuit Court of Appeals which ignores the role of the wholesaler-distributor as the central link in the distribution process by effectively eliminating the wholesaler's distribution allowance.

Therefore, amicus respectfully requests leave to file instant its brief urging reversal of the decision of the United States Court of Appeals for the Ninth Circuit, and in support of Texaco, Inc., Petitioner herein.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF THE
 NATIONAL ASSOCIATION
 OF WHOLESALE-DISTRIBUTORS

SUMMARY OF THE ARGUMENT

I.

The Robinson-Patman Act does not prohibit a seller from offering different prices to purchasers at different levels within the chain of distribution. A distribution allowance granted to a wholesaler by a manufacturer reflects the business judgment of the manufacturer as to the value of the vital functions performed by wholesalers. Such price differentials need not be cost justified since no injury is likely to occur to

direct buying retailers who do not perform the various functions rendered by wholesalers. Wholesalers perform numerous functions which add value to the manufacturer's product. A precise accounting of the value of the performed functions is not mandated. The decision of the Ninth Circuit below represents an attempted adoption of a construction of the Robinson-Patman Act that was discredited almost immediately after it was propounded. Case law establishes the fundamental doctrine that the Act is intended to protect those who sell at the same functional level.

II.

The attempted resurrection of the *Doubleday* theory in the instant case should be rejected. The competitive position of a buyer in the chain of distribution will be determined by the manner in which it resells rather than purchases the product. The decision of the Ninth Circuit is one that penalizes efficiency and promotes upward price stabilization. The Act is not violated where a manufacturer sells to wholesalers at a lower price than to retailers.

ARGUMENT

I

THE NINTH CIRCUIT INCORRECTLY CONCLUDES THAT A SUPPLIER WHO SELLS AT UNIFORM PRICES TO PURCHASERS AT THE SAME FUNCTIONAL LEVEL IN THE CHAIN OF DISTRIBUTION MAY BE LIABLE UNDER THE ROBINSON-PATMAN ACT IF THE DISCOUNT AFFORDED IS NOT COST BASED AND PART OF IT IS PASSED ON TO CUSTOMERS OF THE PURCHASERS WHO COMPETE WITH OTHER CUSTOMERS OF THE SUPPLIER.

As an *amicus*, NAW feels that it would be unavailing, if not pretentious, for it to discuss, in other than general summarized form, the specific facts bearing upon the legal issues in this case. As far as NAW is concerned, its sole objective in filing this *amicus* brief is to sustain the established law that there is no Robinson-Patman Act liability where a supplier-sells at uniform prices to purchasers at the same functional level in the chain of distribution.

To aver that the Act applies in a different manner is to eschew reason. Such a position can only be construed as an attempt to ask this Court to entertain a radical departure from established law, one that would strip the venerable principle of *stare decisis* of its vitality and would seriously injure the large number of businesses engaged in the wholesale-distribution industry which have relied upon and honored the applicable law since the birth of the Robinson-Patman Act.

In responding to the questions of the jury, the trial court incorrectly applied the law in limiting the issue to be decided by the jury. In its direction to the jury that the *only* issue to be decided by that jury was whether gasoline had been sold at a cheaper price to two wholesalers than the price charged to the retailers involved in the case, the trial court incorrectly applied current law.

In upholding the substance of the response of the trial court to the question of the jury, the Ninth Circuit decision is equally inconsistent with comparable cases dealing with that issue.

Especially pertinent here is the decision of the court in *FLM Collision Parts v. Ford Motor Co.*, 543 F.2d. 1019, 1024 (2d Cir. 1976) *cert denied*, 429 U.S. 1097 (1977) in which the court stated:

"(The Act) does not prohibit the seller from offering different prices to each of its purchasers, such as one price when he functions as a retailer and a lower price when he functions as a wholesaler, provided all competing purchasers are treated equally."

That Congress intended such differentials is clear. In *H.R. Rep. 2287, 74th Congress, 2d Session, 8-9 (1936)*, the report explains the pertinent provisions of the Act that expressly permit "price differentials" depending solely upon whether the purchaser buys for resale to wholesalers, to retailers, or to customers, or for use in further manufacture.

Congress viewed the Robinson-Patman Act as raising no obstacle to using the most efficient and economical methods of production, sale or distribution. Nor did Congress view "functional discounts" with suspicion. *The Legislative History of the Federal Antitrust Laws and Related Statutes*, E. Kintner, (1978)

Manufacturers and retailers recognize that wholesalers provide valuable services to them. Wholesalers provide services to manufacturers which, if they did not exist, would have to be provided by the manufacturers. Wholesale distribution produces economies of scale of such magnitude as to present the basic groundwork for increases in national productivity. American productivity currently is bounding ahead in only a few key businesses, one of which is wholesale trade. *America Still Reigns in Services*, Sylvia Nasar *Fortune*, June 5, 1989, P.65.

The differences in prices charged by a manufacturer to a wholesaler reflect the business judgment of that manufacturer as to the value of the marketing function performed by that wholesaler. Value becomes a matter of utility, of time and place, and of need, all of which are variables, and which will have such value placed upon them by the manufacturer as is considered appropriate by that manufacturer for the economic value received. To portray such price differentials as "functional discounts" is to prolong a serious misnomer. It is much more accurate to describe the price differential as what it actually is — the distribution allowance. Such an allowance is determined by the manufacturer, taking into account the fundamental economic value of the wholesaler in the distribution system. Charging different prices to customers at different levels of competition reflects a recognition of the economic realities of distribution. There is no general principle of antitrust law that forbids charging such different prices. *USM Corp. v. SPS Technologies, Inc.*, 694 F.2d. 505, (7th Cir., 1982) Cert. Denied 462 U.S. 1107, (1982)

Such price differentials, often referred to, albeit incorrectly, as "functional discounts", are granted in recognition of the purchaser's function and position in the chain of distribution.

The critical issue as clearly stated by this Court in *FTC v. Ruberoid Co.*, 343 U.S. 470, 475 (1952) is not the functional label under which customers are classified but whether the customers in fact compete. The true test and the only objective means of determining the applicability of Robinson-Patman proscriptions against unlawful price discrimination is the level of competition of the purchasers. For the statute to be applicable, the favored customers must be competitors of the plaintiff. *Centex-Winston Corp. v. Edward Hines Lumber Co.*, 447 F.2d. 585, 7th Cir. (1971). The evil at which the Robinson-Patman Act is aimed is discrimination between

different competing purchasers. *Hartley & Parker, Inc. v. Florida Beverage Corporation*, 307 F.2d. 916, 5th Cir. (1962). There is no violation unless discrimination is "in price between different purchasers" on the same level of competition. *American Oil Co. v. McMullin*, 508 F.2d. 1345, (10th Cir. 1975).

In each of these cases and in all such cases that have correctly interpreted the pertinent provisions of the Robinson-Patman Act as to price differentials between non-competing purchasers, there is the implicit recognition of the vital role of the wholesaler in the chain of distribution.

It is of telling importance that the decision below does not adequately discuss nor take appropriate cognizance of the wholesaler's role in the distribution process. The decision of the court below, based as it is upon the narrow issue of a cost base for a discount, fails to provide for consideration of the benefits derived from the services performed by wholesalers for each segment in the chain of distribution. In so narrowing the boundaries for issue analysis, the court incorrectly applies current law and fails to include material matters in its analytical process, namely, the function of wholesale-distribution in the marketing chain.

Because the term "discount" is often, albeit incorrectly, used in describing the distribution allowance paid to a wholesaler for its services, there is often confusion as to the unique relationship of wholesalers to manufacturers and to retailers in the chain of distribution.

The word "discount" is both ambiguous and pejorative. It is commonly considered as that amount which is taken off for prompt payment, or as a sales incentive, or for moving damaged goods. In this sense, wholesalers are incorrectly seen as mere buyers from a manufacturer.

Obviously, this is much less than meets the eye. As wholesalers market products to customers more cost-effectively than manufacturers, they are earning a share of their cost-effectiveness, not a discount.

The term that more aptly describes the wholesaler's compensation is a distribution allowance, because the costs of a wholesaler's added value to a manufacturer's products can be compared with the other expenses on their earnings statements rather than as a discount from their sales revenues. Manufacturers do not lose part of their revenues to the wholesaler; instead, in utilizing wholesalers, manufacturers add value to their products at less cost.

In a number of vital functions, the wholesaler brings to a manufacturer important advantages in cost that a manufacturer cannot usually achieve on its own, including transportation, storage, financing, risk-taking, product servicing, selling, market information and product development. *Superconductive Ideas*, by Louis H. T. Dehmlow, (1988).

In transportation, a manufacturer using a wholesaler can make a few large shipments rather than many small ones. The economies of scale require fewer factories shipping bulk quantities of limited products to be delivered in concentrated areas at regular intervals.

In storage, wholesalers relieve their manufacturers of finished product inventories by taking title to those products, and storing them in widely dispersed locations in many markets.

In financing, the manufacturer establishes a few credit contacts with several wholesalers rather than tens of thousands of smaller as well as hundreds of larger users. The wholesaler often has a stronger credit position than many of his customers, so the manufacturers risk fewer bad debt losses on

accounts receivable. Moreover, the employees of wholesaler firms live with their customers in their own local vicinity, and maintain much closer contact.

In risk bearing, wholesalers assume the risks involved with inventories and accounts receivable — i.e., the risks of falling prices, product deterioration and obsolescence associated with handling inventory, as well as the risks of bad-debt losses and inflation in handling accounts receivable.

In product servicing, because industrial and commercial products today are often complex, adequate knowledge and service must follow up sales. Without wholesalers, manufacturers would have to maintain extensive field organizations and the associated costs of such structures.

In selling, wholesalers supply a well-trained sales force which contacts small and widely dispersed customers with greater frequency than can be done by a manufacturer alone.

In market information, wholesalers have a major advantage. Because of the close contact with both customers and the suppliers of many products, the wholesaler is in the best position to determine factors involved with supply and demand in the market, and to pass such information on to his manufacturer-suppliers.

Sales to wholesalers by manufacturers must, of necessity, recognize the value-added. Sales to wholesalers at lower prices than to retailers (who do not perform the same functions, or else, such retailers would, in fact, be wholesalers) enables wholesalers to perform their functional role in reselling to retailers. Earning a profit is not a violation of the Robinson-Patman Act. The distribution allowance provides the efficient wholesaler the opportunity for profit and the consumer the opportunity for lower prices. Exclusive cost basis evaluation as dictated by the trial court in the instant

case penalizes the most efficient in the chain of distribution and exacts substantial retribution on consumers while doing nothing to preserve and protect competition.

The price differentials offered to wholesalers are a traditional pricing technique by which suppliers compensate for distributive services. Such price differentials need not be cost justified, since no injury is likely to occur to direct buying retailers who are required to pay a higher price and who do not perform the various functions of distributive services.

The legitimacy of a price differential to a wholesaler is to be judged by examining the capacity in which the buyer resells rather than how it buys. *Boise Cascade Corp.*, 107 F.T.C. 76, 211, *rev'd and remanded* 837 F.2d 1127 (D.C. Cir. 1988).

Actual competition in resale operations is decisive, rather than nomenclature. Ambiguous labels which might be used to cloak illegal discriminatory discounts to favored customers are and should be disregarded. *F.T.C. v. Ruberoid*, 343 U.S. 470, (1952). The FTC has advised that the controlling element is whether or not resale competition actually exists as between and among various resellers rather than the names they use to describe themselves. *FTC Advisory Opinion, File No. 683 7092, released March 14, 1968*. If in fact there is competition at the same level of distribution, that fact, and not the titles used, determines the legality under Robinson-Patman of price differentials offered.

The actual functions performed, not the cost of such functions, is the only acceptable objective test for determination of Robinson-Patman liability.

If the question to be decided in determining the legality under the Robinson-Patman Act is whether the cost of services performed by the purchaser is substantial and whether some part of that differential is passed on to customers of such purchaser, it postulates a legal fiction.

There is no authority for the proposition implicit in the decision of the court below that a supplier must undertake affirmatively to monitor the costs and the pricing policies of wholesalers to which it offers a price differential based upon the purchaser's level of competition. Authority is very definitely the opposite. *Mueller Co.*, 60 F.T.C. 120, 1962, *aff'd*, 323, F.2d. 44 (7th Cir. 1963), *cert denied* 377 U.S. 923, (1964). See also *Dart Industries v. Plunkett Co.*, 704 F.2d. 496 (10th Cir. 1983); *Boise Cascade Corp. v. FTC*, 107 F.T.C., 76 (1986), *rev. and remanded*, 837 F. 2d. 1127 (D.C. Cir. 1988); *Best Brands Beverage, Inc., v. Falstaff Brewing Corporation*, 842 F.2d. 578 (2d Cir. 1987).

To require the seller to inquire into the costs and pricing strategies of the wholesaler in order to avoid Robinson-Patman liability would penalize efficiency and discourage price competition. Instead price differentials to wholesalers reflect the judicially and legislatively recognized fact that the wholesaler does provide a major role in the chain of distribution and that such differentials are intended to reflect, from an economic view, the supplier's estimate of the value of the functions performed by the wholesaler. Supplier's are free under the provisions of the Robinson-Patman Act to grant such price differentials on an equal basis to its customers who compete at the same level of distribution. *F.T.C. v. Ruberoid Co.*, 343 U.S. 470, (1952).

A precise accounting of the value of the performed function is not mandated. The issue in this case is not the narrow question of whether a price differential is passed on, a particularly incongruous position which rewards inefficiency and inevitably produces only self-defeating, and non-competitive consequences. The real issue in this case is without question of major national significance. It is a question of whether the Act shall continue to be utilized as a vehicle for the protection and promotion of competition. The decision below represents

a new construction of the Robinson-Patman Act, a construction that was first propounded in 1955 but which was almost immediately discredited and which has not been followed during the life of the Act. Case law is abundant in establishing the fundamental doctrine that the Robinson-Patman Act is intended to protect those who sell at the same functional level.

II

THE ROBINSON-PATMAN ACT IS NOT VIOLATED WHEN A MANUFACTURER SELLS TO WHOLE- SALEERS AT A LOWER PRICE THAN RETAILERS

The decision of the Ninth Circuit in this case has resurrected a long-ago decided battle involving competing theories of Robinson-Patman ideology. The combatants in this battle are the theories espoused in *Doubleday & Co.*, 52 F.T.C. 169 (1955) versus *Mueller Company*, 60 F.T.C. 120 (1962), *aff'd*, 323 F. 44 (7th Cir., 1963).

The Ninth Circuit Decision attempts to reinstate the discredited proposition that a discounted price to a wholesaler must be cost justified and concludes that where that discount or any part of it is passed on to customers of that wholesaler, the harm to competitors of such customers can be utilized as evidence of the requisite harm to competition.

Thus, the Court searched back into history and attempted for still another time to adopt the doctrine of the *Doubleday* case. That case held that a discount that equals the buyers expense in rendering services is incapable of producing competitive injury or that it is justifiable and lawful *irrespective of such injury, thereby ignoring the basic foundation of the Robinson-Patman Act.*

Under *Doubleday*, decided in 1955, no injury to competition under Section 2(a) will result because of a buyer's receipt of a

discount from a supplier if the discount simply compensates the buyer for services it performs for the benefit of the supplier. That case was overruled rather quickly but subtly in 1956 in *FTC v. General Foods Corp.* 52 F.T.C. 798, (1956) where the Commission looked to the level of competition of the buyers to determine legitimacy of price differentials under the Act. The *Doubleday* doctrine was very firmly overruled in the *Mueller* case decided in 1962 where the Commission held that the principles articulated in *Doubleday* had been overruled, *sub silentio*, in the *General Foods* case.

The Commission in the *Mueller* case adopted a rule which holds that the position of a buyer in the chain of distribution will be determined by the manner in which it resells, rather than purchases, the product.

Under the *Mueller* doctrine, recently reaffirmed by the Commission in *Boise Cascade Corporation v. FTC* 107 F.T.C. 76 (1986) *rev'd and remanded* 837 F.2d 1127 D.C. Cir., (1988), the Robinson-Patman Act is determined to protect competition among those who sell at the same functional level. Manufacturers are permitted to use price differentials, commonly known as a wholesale or functional discount (but more appropriately identified as a distribution allowance) to compensate certain classes of buyers for the distribution services they perform. *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, (1948).

In its decision in the instant case, the Ninth Circuit has once again attempted to resurrect the *Doubleday* doctrine out of its appropriately directed burial ground, stating:

"(3) That all wholesalers were offered the same discount would be an appropriate defense in a case where the plaintiff and the other customers of the defendant were all wholesalers performing at the same level in the chain of distribution. Here, however, only the other customers are wholesalers; the

plaintiffs are retailers who are further down the chain the distribution. *The inquiry occurs at the latter level and results from the receipt by wholesalers of a functional discount in excess of the value of the services they perform, all or a portion of which they then pass on to the retailers they supply.* (emphasis supplied)

"As the Supreme Court long ago made clear, and recently reaffirmed, there may be a Robinson-Patman violation even if the favored and disfavored buyers do not compete, so long as the customers of the favored buyer compete with the disfavored buyer or its customers. *Morton Salt*, 334 U.S. at 43-44; *Perkins v. Standard Oil Co.*, 395 U.S. 642, 646-47(1969); *Falls City Indus., Inc. v. Vanco Beverages, Inc.*, 460 U.S. 428, 434-35 (1983). *Despite the fact that Dompier and Gull, at least in their capacities as wholesalers, did not compete directly with Hasbrouck, a section 2(a) violation may occur if (1) the discount they received was not cost-based and (2) all or a portion of it was passed on by them to customers of theirs who competed with Hasbrouck*". Pet.App. 7-8. (emphasis supplied)

Thus, the Ninth Circuit in this case has clearly adopted the position that a seller may only grant a discount to a wholesaler where the discount compensates the purchaser for costs incurred on behalf of the seller and where some part of that discount is passed down into the chain of distribution, a violation of the Act will occur. This theory is merely a clone of *Doubleday* and does not recite a correct statement of applicable law under the Robinson-Patman Act.

This attempted adoption of the discredited *Doubleday* theory by the Ninth Circuit in this case brings the issue of functional discounts to the forefront. Functional discounts, more

accurately called distribution allowances, are a basic ingredient in the wholesale-distribution industry. They were well established as accepted pricing methods at the inception of the Robinson-Patman Act. The adoption of the *Doubleday* theory by the lower Court in this case threatens a state of chaos for suppliers and wholesalers alike and the very existence of the unparalleled and highly efficient distribution system which exists today in this country.

Such price differentials have been and continue to be a traditional pricing technique through which sellers compensate buyers for performing the distribution function.

The question to be addressed is who is entitled to the price differential and in what amount. In *Doubleday*, the Federal Trade Commission attempted to formulate some method to answer this question by shifting the focus of the inquiry from the purchaser's method of resale to his buying function. "Where a businessman performs various wholesaler functions, such as providing storage, traveling salesmen and distribution of catalogs, the law should not forbid his supplier from compensating him for such services." *Doubleday*, supra, at 209.

Commissioner Secrest, although concurring with the result in *Doubleday*, correctly foretold of the enormous difficulties such an approach would bring to the marketplace when he stated:

"Functional classification of customers for discount purposes should be conditioned on their character as sellers, not on the performance of any services to their supplier. To hold otherwise would lead to pricing by individual customers which would undoubtedly give the larger buyer a price advantage in the resale of the seller's goods." 52 F.T.C. Dec. at 211.

The Commission was again confronted with the issue of how to determine who is entitled to price differentials when it heard the *Mueller* case. In reviewing the opinion in *Doubleday* the Commission reversed itself:

"The other interpretation, that injury will not result from a functional discount 'reasonably related to the expenses assumed by the buyer', ignores the fact that the favored buyer can derive substantial benefit to his own business in performing the distributional function paid for by the seller. Consequently, we disagree with both interpretations and, insofar as the language in *Doubleday* stands for either of them, it is rejected." 60 F.T.C. at 127.

Since *Mueller*, the focus of inquiry has been on the purchaser's capacity as a seller of the product rather than on how it is purchased.

The conflict between *Mueller* and *Doubleday* was recently reviewed at length in the case of *Boise Cascade Corporation v. Federal Trade Commission*, 107 F.T.C. 76 (1986), rev'd and remanded 837 F.2d 1127 (D.C. Cir. 1988). In commenting, the Court in that case noted the difficulty in attempting to enforce the decision:

"This contrary (soon to be called *Mueller*) principle was thus informed by both instrumentalist and conceptual concerns: the *Doubleday* rule would be an immense headache to administer, and the rule would justify a discount where the buyer, by providing such services, was improving its own competitive position with other buyers. And this latter reality raised the spectre of Robinson-Patman's core concern for little fish competing with whales (or at least larger fish). *Doubleday's* rule, in short,

"would undoubtedly give the larger buyer a price advantage in the resale of the seller's goods." 837 F.2d. 1127 at 1141.

Any interpretation of the Robinson-Patman Act which creates a cost-base justification coupled with a pass-on requirement, as the Ninth Circuit decision would do, is one that penalizes the efficient and promotes upward price stabilization, while actually working to reduce competition, the complete antithesis of the intent of the framers of the Act.

Today, we live in what can most accurately be described as the "age of distribution". More workers are employed in the transportation and distribution of goods and services than in any other segment of the U.S. economy. The Robinson-Patman Act, enacted to preserve, protect and to *promote* competition has accomplished its goal. Although it introduces a complexity in day to day operation of a business that is often perplexing to all parties coming in contact with the provisions of the Act, it has withstood the test of time and efficacy. As correctly interpreted under *Mueller* and by a long line of cases upholding the competitive preservation and promotion resulting from such an application of the law, the Act has supplied and continues to supply the supportive legal tools to meet the modern demands of distribution.

The *Doubleday* doctrine does not meet the requirements of the Act nor does it meet the requirements of our highly competitive modern distribution system. In *Eximco, Inc. v. Transocean Co.*, 737 F.2d. 505 5th Cir. (1984), the U.S. Court of Appeals for the Fifth Circuit recognized the Act as a statement of economic policy, citing almost a half century of interpretative case law, economic analysis and commentary under which the Act has been illuminated. In that light, said the Court, we must examine section 2(a) in view of sound economic theory and attempt to effectuate as much as possible the somewhat

paradoxical intent behind the Robinson-Patman Act which is to promote competition by protecting competitors. (*Eximco*, at p. 514-515).

The lesson of the long line of cases upholding *Mueller* is that sellers are required under the Robinson-Patman Act to treat equally those who actually compete on the same level of distribution. The Act is not violated where a manufacturer sells to wholesalers at a lower price than to retailers.

CONCLUSION

It is respectfully submitted that the Robinson-Patman Act is not violated by a manufacturer who sells goods to wholesalers at a lower price than to retailers; that the Ninth Circuit Court of Appeals decision is not a logical and reasonable determination of applicable law; and that the decision should be reversed.

Respectfully submitted,

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